IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1700 Misc. OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

RECEIVED
APR 12 1968
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioner, Robert LeRoy Pruett, who is now confined at the Ohio State Penitentiary in Columbus, Ohio, as the result of the jury verdict of the Common Pleas Court of Ashtabula County, Ohio, finding the petitioner guilty of murder in the first degree and sentencing him to death by electrocution on the 18th day of August, 1965, hereby asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this motion is attached hereto.

NAZOR AND NAZOR

BY Edward M. Nazor

BY London L. Nazor

ATTORNEYS FOR PETITIONER
Gillmore Building
Ashtabula, Ohio 44004
#216-993-2121

STATE OF OHIO)
) SS.
COUNTY OF FRANKLIN)

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO.

ROBERT LEROY PRUETT

PETITIONER

-vs-

UNITED STATES OF AMERICA

RESPONDENT

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ROBERT LEROY PRUETT, being first duly sworn according to law, depose and say that I am the petitioner in the above entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. I was convicted of the crime of murder in the first degree in violation of O. R. C. Section 2901.01 by the jury verdict of the Common Pleas Court of Ashtabula County, Ohio, and was sentenced to death by electrocution. I am presently confined in the Ohio State Penitentiary in Columbus, Ohio.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said cause.

5. During the proceedings had in the courts below, I was represented by the Law Firm of Nazor and Nazor, assigned counsel, without expense to me and I have requested that they continue to so represent me on this petition.

WHEREFORE, it is respectfully prayed that this application for leave to proceed in forma pauperis be granted.

Robert Leroy Pruett
ROBERT LEROY PRUETT

Sworn to before me this 2 day of February, 1968.

Fred Renault
NOTARY PUBLIC

FRED RENAULT
NOTARY PUBLIC, FRANKLIN COUNTY, OHIO
MY COMMISSION EXPIRES 10/16/72

INDEX TO PETITION

OPINIONS BELOW 1

JURISDICTION 1

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO DISMISSING APPEAL SUA SPONTE 33

MANDATE OF THE SUPREME COURT OF OHIO SETTING EXECUTION DATE 34

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO STAYING EXECUTION 35

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE WRIT

FIRST REASON

THE MOTOR VEHICLE OF THE DEFENDANT WAS ILLEGALLY SEIZED AND SEARCHED, NO SEARCH WARRANT HAVING BEEN OBTAINED 7

SECOND REASON

A STATEMENT AGAINST INTEREST WAS MADE BY THE DEFENDANT WITHOUT THE DEFENDANT'S HAVING BEEN EFFECTIVELY WARNED OF HIS CONSTITUTIONAL RIGHTS AND SAID STATEMENT WAS ADMITTED INTO EVIDENCE 12

THIRD REASON

A JUROR PRIOR TO BEING SWORN MADE A STATEMENT TO OTHER PROSPECTIVE JURORS THAT HE WAS OF THE OPINION THAT THE DEFENDANT WAS GUILTY. THIS JUROR WAS PERMITTED TO SIT IN THE CASE THUS DEPRIVING THE DEFENDANT OF HIS RIGHT TO HAVE A TRIAL BY A FAIR AND IMPARTIAL JURY 15

FOURTH REASON

THE TRIAL COURT PERMITTED THE INDICTMENT TO BE AMENDED DURING THE COURSE OF THE TRIAL TO INCLUDE A SECOND AND SEPARATE OFFENSE OF MURDER IN THE FIRST DEGREE WHILE ATTEMPTING TO COMMIT RAPE. THIS VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION 18

FIFTH REASON

THE COURT ERRED IN REFUSING TO ADMIT SURREBUTTAL EVIDENCE OF THE DEFENDANT AFTER THE COURT PERMITTED THE STATE TO INTRODUCE REBUTTAL EVIDENCE WHICH IN FACT REBUTTED NO PART OF THE DEFENDANT'S EVIDENCE. THIS VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION 21

SIXTH REASON

DOES THE MANDATORY IMPOSITION OF THE DEATH PENALTY UPON THE DEFENDANT AS A CONSEQUENCE OF THE STATE'S CONVICTION OF MURDER IN THE FIRST DEGREE WITHOUT A RECOMMENDATION OF MERCY, VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 26

SEVENTH REASON

A NUMBER OF PROSPECTIVE JURORS WHO WERE EXAMINED AS TO THEIR QUALIFICATIONS WERE EXCUSED FOR THE SOLE REASON THAT THEY WERE OPPOSED TO CAPITAL PUNISHMENT, PREVENTING THE DEFENDANT FROM HAVING A FAIR AND IMPARTIAL TRIAL BY A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 27

CONCLUSION 27

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 29, 30

APPENDIX . . . . . Separately Printed

IN THE

SUPREME COURT OF THE UNITED STATES
NO. , OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

NAZOR AND NAZOR
ATTORNEYS AT LAW
Counsel for Petitioner
Gillmore Building
Ashtabula, Ohio 44004

HOWARD M. NAZOR
GORDON L. NAZOR
OF COUNSEL

TABLE OF AUTHORITIES

Abel v. U. S., 4 L. Ed. (2d) 668 12
Agnello v. U. S., 70 L. Ed. 145 9
Alexander v. Green, 2 Ohio State (2d) 231 14
Carr v. State, 22 Ohio Appellate 78 18
Dennis v. U. S., 70 S. Ct. 518, 339 U. S. 162 15
Donald v. State, 11 Ohio Circuit Decisions 483 . . . . . 24, 25
Escobedo v. Illinois, 378 U. S. 478 15
Fahy v. Connecticut, 375 U. S. 85 8
Harris v. State, 125 Ohio State 257 20
Itskin v. State, 51 Ohio Appellate 211 24
Ker v. California, 374 U. S. 23 8
Mallory v. U. S., 354 U. S. 449 . . . . . 14, 15
Mapp v. Ohio, 367 U. S. 343 . . . . . 8, 10
Preston v. U. S., 376 U. S. 364 . . . . . 8, 9, 10
State v. Burnius, 177 Ohio State 155 . . . . . 9, 10, 11
State v. Cimpritz, 158 Ohio State 490 20
State v. Lett, 106 Ohio Appellate 285 25
State v. Miles, 41 Ohio Law Abstract 1 25
State v. Presler, 112 Ohio Appellate 437 20
State v. Wozniak, 172 Ohio State 517 . . . . . 20, 21
Stoner v. California, 376 U. S. 364 . . . . . 8, 9
U. S. v. Bayette, 299 Fed. (2d) 92 12
U. S. v. Valentine, C C Tenn., 202 Fed. Supp. 677 7
Vecchio v. State, 8 Ohio Law Abstract 335 26

TEXT.

47 American Jurisprudence, July 1967-July 1968 Supp., p. 74 11

CONSTITUTION.

CONSTITUTION OF THE UNITED STATES:
Fourth Amendment 2, 7, 8, 29
Sixth Amendment 2, 15, 27, 29
Eighth Amendment 3, 26, 29
Fourteenth Amendment 3, 8, 9, 15, 26, 29

STATUTES AND RULES.

OHIO REVISED CODE:
Section 2901.01 . . . . . 3, 19, 26, 30
Section 2933.23 . . . . . 7, 8, 30
Section 2941.30 . . . . . 3, 19, 20, 30
Section 2945.10 . . . . . 21, 22, 24, 25, 31

28 U.S.C.A. 1257 (3) 2, 32

IN THE

SUPREME COURT OF THE UNITED STATES

NO. , OCTOBER TERM 1967

ROBERT LEROY PRUETT

PETITIONER

-vs-

STATE OF OHIO

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Robert LeRoy Pruett, respectfully prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court and the Court of Appeals of the Seventh Judicial District of Ohio, affirming the judgment of the Court of Common Pleas of Ashtabula County, Ohio, rendered on the 23rd day of February, 1965, convicting this defendant of murder in the first degree without recommendation of mercy. The finding of the Court of Appeals of the Seventh Judicial District of the State of Ohio is sought to be reviewed because the Supreme Court of Ohio, when an appeal was taken there, dismissed the appeal sua sponte and no opinion was ever rendered by the Ohio Supreme Court.

OPINIONS BELOW

Inasmuch as the opinion of the Court of Common Pleas of Ashtabula County, Ohio, overruling the motion for a new trial, and the opinion of the Court of Appeals of the Seventh District of the State of Ohio affirming the judgment below are voluminous, the same is printed in the Appendix.

No opinion was rendered by the Ohio Supreme Court as the appeal was dismissed sua sponte without a hearing on the merits.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing the appeal sua sponte was rendered on the 20th day of December, 1967, a copy of same appearing on page 33 herein.

An enlargement of time to file this petition was granted by Mr. Justice Stewart on March 12, 1968 and petitioner's time extended to and including April 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1.

Whether the seizure and search of defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the Fourth Amendment to the U. S. Constitution, whether any alleged evidence obtained as a result thereof should be suppressed, and whether admission of said evidence at the trial of the cause constitutes reversible error.

2.

Whether after the eliciting of incriminating statements from the defendant, the investigation having begun to focus upon the defendant in particular as a suspect, and the defendant having been taken into police custody, and the defendant not having been effectively warned of his absolute constitutional rights to remain silent, such statements elicited by police may be used against him at the trial.

3.

Whether a juror should be permitted to sit in the trial of a criminal case when prior to being sworn, he made a statement to other prospective jurors that he was of the opinion the defendant is guilty. In the instant case the juror was permitted to sit thus depriving the defendant of a fair and impartial trial under the Sixth Amendment to the U. S. Constitution.

4.

Whether the amendment, during the course of the trial, of an indictment alleging murder in the first degree while in the commission of rape, adding a second and separate offense of murder in the first degree while attempting to commit rape, is error.

5.

Whether it is error for the trial court to permit rebuttal evidence by

the State when in fact said evidence rebuts no part of the evidence of the defendant, and further after admission of said evidence, whether it is error on the part of the trial court to refuse the defendant the right to surrebuttal, that is to say the right to present evidence refuting the evidence introduced in the State's rebuttal.

6.

Whether the mandatory imposition of the death penalty upon the defendant as a consequence of the State's conviction of murder in the first degree without a recommendation of mercy violates the Eighth and Fourteenth Amendments to the United States Constitution.

7.

Whether the exclusion of several prospective jurors on the sole ground that they are opposed to capital punishment prevents the defendant from having a fair and impartial jury trial.

STATEMENT OF FACTS

The defendant, Robert LeRoy Pruett, was indicted at the September 1964 Term of the Ashtabula County Grand Jury, recalled, for first degree murder for the killing of one Susan Osborne following the commission of rape. This indictment was brought under and by virtue of Section 2901.01 of the Revised Code of Ohio and during the course of the trial a motion was made by the Prosecuting Attorney to amend the indictment to have inserted after the words "in the perpetration of a rape", the words "or attempting to perpetrate a rape", this amendment being permitted under Ohio Revised Code 2941.30 by the Court on February 11, 1965, the trial of the case having commenced on February 1, 1965. (R. Vol. 2, pp. 590-591).

The evidence showed that the defendant, Robert LeRoy Pruett, was a married man who had come to the City of Conneaut, Ohio, to live with his wife in the early summer of 1964; that he was without employment at that time and enrolled in a Manpower Training School in Ashtabula, Ohio, and was attending said school at the time of the alleged commission of the offense.

The evidence indicated that on occasion, the defendant and his wife, frequented beer parlors and a short time prior to the date alleged in the indictment, to-wit: September 15, 1964, had made the acquaintance of the decedent, one Susan Osborne, who was seventeen (17) years of age. The evidence further indicated that the defendant and his wife had been in Susan Osborne's company on at least two (2) occasions prior to September 14, 1964, and that Susan Osborne at said

times had been in the company of various men; that Susan Osborne, although being seventeen (17) years of age, frequented beer parlors until the early hours of the morning and was subject to little or no supervision from her mother with whom she lived in Conneaut, Ohio. In other words, Susan Osborne was a person with far more worldly experience than the average girl of her age.

The evidence established that on the night of Monday, September 14, 1964, the defendant and his wife made the rounds of several beer parlors accompanied by one Norman Balcomb, a friend of the defendant. While on these rounds, they came in contact with the deceased girl, Susan Osborne, at a beer parlor and she accompanied them for the remainder of the evening. During the course of the evening the evidence showed that Susan Osborne consumed several drinks of rum and possibly some beer. At about midnight, defendant's wife, Marcia Pruett, who was pregnant, requested to be taken home. After this was done by the defendant and Balcomb, they proceeded to take Susan Osborne to her home in Conneaut, Ohio. At that time, the evidence showed that it was suggested by Balcomb, who lived in Ashtabula, Ohio, that Susan Osborne ride to Ashtabula with the two young men and then the defendant would return her to her home in Conneaut. Pursuant to this arrangement these three people went to Ashtabula in Pruett's Ford automobile, Susan Osborne riding in the back seat with Balcomb and the defendant operating the automobile.

The evidence showed that Balcomb became familiar with Susan Osborne in the back seat of the car. Balcomb, who was a married man, was let out of the car at his home in Ashtabula and Susan Osborne got into the front seat of the automobile with Pruett. Pruett's testimony was to the effect that he had some conversation with the girl and that at a red light on Lake Avenue in Ashtabula, she opened the door and jumped out of the car. Pruett testified that he attempted to follow her, but there was traffic at this point and that he drove around for some time looking for her and that he finally drove home to Conneaut via Route 20 and arrived home at about 1:30 a.m. This testimony as to the time he arrived home was corroborated by the witness, Maxine Morgan, the defendant's wife, and by the defendant's mother-in-law, Marjorie Clowes. The uncontradicted evidence of his wife was that there were no blood stains on his clothes and that he had no marks of violence on his body when he arrived home.

The defendant and his wife arose early the following morning when the defendant took his wife to work in Ashtabula and he himself went to the Manpower

Training School. Marcia Pruett testified there was no evidence of any blood on the inside of the car.

On Saturday, September 19, 1964, Susan Osborne's nude body was found in some weeds lying about one hundred (100) feet from Lake Road in Ashtabula Township, this area being reached by a lane running south from Lake Road. The authorities were called and it was found that the girl had been dead for some time, that all of her clothing had been removed, a part of same lying on the ground near her and part of the clothing folded nearly under her buttocks. Some of the clothing was quite bloody, the face and neck had started to decompose, some of the facial bones, the jaw and the hyoid bone were broken, there was profuse hemorrhaging around the larynx and trachea and there were multiple severe fractures of all facial bones and lower jaw. There was no evidence of forcible removal of the girl's clothing. (R. Vol. 1, pp. 166-167).

At the autopsy, a swab was made to determine the presence or absence of any seminal fluid and no seminal fluid or sperm cells were found. There were no bruises or injuries of any kind around the exterior genitalia or thighs of the deceased girl, which according to the testimony, contraindicated any evidence of force being used to compel her to submit to sexual relations. The evidence clearly showed on both sides of the case that there was no definite proof that the girl had engaged in sexual relations prior to or following her death. Dr. J. R. Higerd, the County Coroner, was unable to say that there had been any sexual assault. (R. Vol. 1, p. 167).

It was discovered on Sunday, September 20, 1964, by the authorities that the defendant was the last known person to have been with the deceased girl. He was picked up shortly before noon on Sunday, September 20, 1964, and was not given benefit of counsel. Deputy Sheriff Roach testified that when he questioned the defendant at the police station in Ashtabula shortly after having picked him up at his home, that the defendant told him that he had taken the girl to the scene of the crime but that she got out of the car and he started to get out after her and at that time he stopped talking and refused to talk further. There was no corroboration of Roach's story. The defendant vehemently denied that he had made this statement and stated that he had told the witness Roach that the deceased girl had gotten out of the car on Lake Avenue and that he started to get out after her, but did not on account of traffic. The evidence showed that Roach made no effort

to write down any statement made at the police station and made no effort to call in any other officers to hear the alleged statement made by the defendant. Furthermore there was no evidence showing that the defendant was fully advised of his rights, particularly his right to remain silent and that anything he might say might be used against him.

The defendant was never released from custody following the time he was picked up by officers shortly before noon on September 20, 1964, and the defense maintains that he was placed under arrest when he was taken into custody at his home at said time. Later the same day, the defendant was further questioned by the officers and made no admissions of any kind as to guilt and requested that he be given benefit of counsel.

After the defendant's arrest and at a different place than the place where he was arrested, the defendant's Ford automobile, was taken by the proprietor of a private garage on the order of the Sheriff, to this private garage on the outskirts of Ashtabula, Ohio. Later in the same week, the exact time not appearing in the evidence, there were certain articles removed from the car, to-wit: a radio grille and a seat cover. A search warrant was never obtained by the authorities either prior to seizing the car on September 20th or prior to the searching of the car at an unknown subsequent time during that week. Prior to the commencement of the trial a motion to suppress the evidence obtained from the car was filed by the defendant, and at the original hearing of said motion by the Court, the motion was sustained and the Court ruled that the articles taken from the car were not competent evidence. The State filed an application for a re-hearing which was granted and following the re-hearing, the Court reversed its prior holding and overruled the motion to suppress.

This case came on for trial on February 1, 1965, the trial being concluded on Feburary 23, 1965. A motion was made by the defense that the defendant be discharged at the conclusion of the State's case which was overruled by the Court, this motion being renewed at the conclusion of all of the evidence, same being overruled by the Court. The case was submitted to the jury on February 23, 1965, and the jury returned a verdict of guilty of murder in the first degree without a recommendation of mercy.

A motion for a new trial was duly filed and argued at length and same was overruled by the trial Court. An appeal was taken on questions of law to

the Court of Appeals and on the 23rd day of June, 1967, a journal entry was filed in the Court of Appeals affirming the judgment of the lower court, the Court of Appeals writing a very brief opinion and failing to touch upon many of the important constitutional questions raised in this case.

Notice of Appeal was duly filed appealing this case to the Supreme Court of Ohio from the final order of the Court of Appeals of the Seventh District of Ohio, and a Memorandum in Support of Jurisdiction was filed in the Supreme Court of Ohio. A referee was appointed by the Ohio Supreme Court to hear arguments of counsel as to why the Ohio Supreme Court should take jurisdiction of this case and after the case was argued before the Referee and without hearing the case on its merits, the Ohio Supreme Court dismissed the appeal sua sponte. No opinion was ever rendered by the Ohio Supreme Court. The last opinion in this case was rendered by the Court of Appeals of the Seventh District of Ohio.

REASONS FOR GRANTING THE WRIT

FIRST REASON

We contend that the search and seizure of the defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution, and, therefore, the car itself was erroneously admitted into evidence as was also certain material taken therefrom.

U. S. v. Valentine, C C. Tenn. (1962) 202 Fed. Supp. 677 holds that the 4th Amendment must be given broad and liberal construction in favor of the individual citizen in order to thwart illegal invasion of constitutional safeguards to the end that this Amendment may at times defend the guilty, but may also protect the innocent.

The 4th Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Ohio Revised Code 2933.23 provides as follows:

> "A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall

> state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

Under the evidence in this case, to-wit: that the defendant's automobile was standing in the driveway of the house in which he was living at the time he was taken into custody by the police; that he was subsequently taken to jail in Jefferson, Ohio; that the car was then removed to a place other than the place where the defendant was taken into custody; that at least several days after the defendant was incarcerated, the car was searched; that at no time during this procedure was a search warrant issued; and that certain items taken from the car were later introduced into evidence, and the car itself was introduced into evidence over the objection of the defendant, both by way of motion to suppress and an objection at the time of the trial, it is submitted that the search and seizure of the defendant's automobile was illegal and the subsequent admission in evidence of the car itself and the portion of the interior taken from the car was likewise improper being in violation of the 4th Amendment to the Federal Constitution.

In support of this contention we wish to refer the Court to Fahy v. Connecticut, 375 U. S. 85, (1963), wherein the Court said:

> "Where evidence which has been found as a result of an illegal search, has not been suppressed on request and has been erroneously admitted against a defendant, a conviction should be set aside if it appears that there is a reasonable possibility that the admission of such evidence contributed to the conviction." See also Stoner v. California, 376 U. S. 483; Preston v. U. S., 376 U. S. 364; Mapp v. Ohio, 367 U. S. 343 (1961).

In the instant case the admission into evidence of the car itself and the portion of the interior taken from the car, found as the result of the illegal search was not suppressed on motion of the defendant made prior to the trial. It is established now that in the light of the decision in the Mapp case and Ker v. California, 374 U. S. 23 (1963), that the 14th Amendment of the United States Constitution picks up the 4th Amendment, and applies it to state courts, including the federal standards that have developed thereunder. The 14th Amendment of the United States Constitution reads in part as follows:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

It is the contention of the defendant that the search and seizure of his automobile in order to have been legal must have been made substantially contemporaneous with the arrest as to time and place. The search and seizure also must be incidental to a lawful arrest. The leading case here is Agnello v. U. S., 70 L. Ed. 145 (1925). In this case the defendant was arrested in the house of a man named Alba. He was taken to the police station and while being interrogated, other officers went to Agnello's house and, without a warrant, searched for and seized a quantity of cocaine. During the trial of the case, the State attempted to use the cocaine in evidence, but it was excluded by the Court. In its opinion the Court said:

"Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrest."

The Agnello case is important because of several later cases which relied on the distinction which the Court made between a search and seizure being made in the vicinity of the arrest and about the same time, and a search and seizure made at a place different than the arrest and at a different time. In the Agnello case, the arrest was at the house of a man named Alba, and yet the the search and seizure was at a different house and later in the same day. In the case of Stoner v. California, 84 S. Ct. 889 (1964), where a room of a guest of a hotel was searched without a warrant, the Court excluded evidence obtained in the search as the search was not an incident to the arrest. The Court in citing and relying on the Agnello case laid down the basic test in this area as to what is "incident to an arrest." In this connection the Court said:

"But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." (Underscoring supplied). Agnello v. U. S. 46 S. Ct. 4.

Soon after the Stoner and Preston cases, the Ohio Supreme Court spoke unanimously on this subject. In the case of State v. Burnius, 177 Ohio State 155,

(decided December 23, 1964), the entire Court speaking through Taft, C. J. said:

> "The Supreme Court of the United States has held that the Fourteenth Amendment to the Constitution of the United States now requires a state court to suppress any evidence, no matter how reliable, acquired as a result of an unreasonable search. This represents a departure from its previous decisions on this precise question. (Mapp v. Ohio, (1961) 367 U. S. 643, 672). However much the writer may disagree with the most recent holding of the Supreme Court on this question or question its wisdom or soundness, we are required to follow it just as we followed its previous holding on the same question. (See State v. Mapp 170 Ohio State 427.)
>
> "The search of defendant's automobile, having been made after the possessor of the automobile had been arrested and removed with the automobile to the police station, cannot be justified as incident to a lawful arrest." (Preston v. U. S. (1964) 376 U. S. 364).

The defendant objected at every stage of the proceedings to the illegal search and seizure and the admission of evidence resulting therefrom. A motion to suppress the evidence illegally obtained was filed prior to the actual trial of the case. This motion was sustained by the Court, a portion of his opinion being as follows, to-wit:

> ". . . we have to recognize that under the circumstances shown Pruett has an interest in the car sufficient to let him object and raise the issue concerning this search, the next question being whether or not in the light of the recent decisions this was a lawful search. Well, I don't think too much need be said on that either.
>
> ". . . I think the thing that makes the difference is that after the arrest, and by the way, the transcript shows that the affidavit was filed on the 20th, the same day as the arrest, the evidence in this motion shows that the search was not made until some time during the following week, and it hasn't been specifically pointed up as to when.
>
> "Now after the car was in possession of the law, certainly then a search warrant could have been obtained easily enough. It wasn't, and of course, that is the issue we are dealing with. Was it necessary? While I may have some personal opinions about some of these rules, I have to follow what I plainly see and I don't see how this search under these circumstances, in view of these rules or the rule as announced in several of these cases, can be justified.
>
> "The motion to suppress will be sustained and the prosecution ordered to return the car, the radio and the piece of the seatcover."

Immediately following the hearing on the motion to suppress, a motion was filed by the State to re-open the hearing which was granted by the Court. The only additional testimony given on behalf of the State was that it had evidence to prove that the automobile was an instrument or implement used in the commission of the crime. (R. Vol. 1, p. 116). The Court thereupon re-opened the hearing, reversed its former holding, and when the automobile and the parts taken therefrom were offered in evidence at the trial, same was admitted over the objection of the defendant. It is submitted that the mere fact that the deceased girl might have been transported in the car during the night of the alleged murder, did not make the automobile an instrument or implement used in the commission of the crime. Furthermore, this evidence was available at the first hearing on the motion.

The Court in reversing itself stated that the automobile could be searched and seized because the officers had "probable cause to believe that a motor vehicle has been used in connection with the commission of the crime, not necessarily the instrumentality alone by means of which the death is caused. . . ." (R. Vol 1, p. 153). The Court did not hold that the automobile was an instrument or implement in connection with the commission of the crime, but only that the officers had probable cause to believe the automobile had been used in connection with the commission of the crime, completely ignoring the decisions of the United States Supreme Court previously cited in this Petition and the Burnius case.

Nowhere does the law warrant seizure and search of an object which is used in connection with the commission of the crime without a search warrant. The car itself and the material taken therefrom were purely evidentiary matters and, therefore, were improperly admitted into evidence. With reference to the seizure of purely evidentiary matters, a good summation of the legal principle involved here is contained fn 47 Am. Jur. Supp. pp. 69-70, wherein it is stated:

> "Thus it is clear that a search of premises without a warrant, made in connection with a lawful arrest, is not by nature an unlawful search, nor is it by its nature lawful; the right to make such a search is a strictly limited one; only a reasonable search is permissible, and the bounds of reasonableness are overstepped when (1) the premises searched are separated from the place where the arrest was made or (2) the search is a 'general' and 'exploratory' one; or (3) the search has as its purpose the seizure of things to be used purely as evidence (as distinguished from the fruits of the crime--such as stolen property--and the means by which it was committed). . . ." (underscoring supplied.)

Two recent Supreme Court cases which distinguish between instrumentalities and evidentiary matters are U. S. v. Bayette, 299 Fed. (2d) 92 and Abel v. U. S., 4 L. Ed. (2d) 668. When the instant case was tried, the car, radio grille, and seatcovers were all admitted in evidence over the objection of the defense, the same arguments being advanced at that time that were advanced at the hearing on the motion to suppress, but the trial Court entirely ignored the ample authorities dealing with unlawful search and seizure and admitted all of the exhibits.

SECOND REASON

After the defendant Pruett was arrested and taken from his home at about noon on September 21, 1964, he was taken immediately to the police station by Deputy Roach who testified extensively in this case. It was there that Deputy Roach claimed that the defendant told him he had taken the girl to the scene of the crime, that she got out of the car and he got out of the car after her, and this is when Roach said the defendant said several times, "I didn't do it." (R. Vol. 2, pp. 527, 530, 840, 843).

The testimony of the defendant and Deputy Roach conflict considerably, but Roach admitted on cross-examination that he did discuss the offenses of first and second degree murder with the defendant, although he denied that he told the defendant that he would help him if he gave Roach a statement. The defendant's testimony was to the effect that Roach told him about the different degrees of homicide and told him if he would tell him what happened, that the offense, which he assumed would be first degree murder, would be reduced. When Roach was cross-examined as to his reasons for discussing the different degrees of homicide with the defendant, the following questions were asked and the following answers were given:

"Q. Didn't you tell him at that time that if he would tell you how this was done and admit this that you would help him?

MR. MAHONEY: Objection, Your Honor. He has already answered that.

THE COURT: Overruled. You may answer. Read the question.

(Question read.)

"A. Only to the extent of taking a statement from him.

Q. Would that be helping him, do you think?

A. I assume it would." (R. Vol. 2, p. 428).

Roach further admitted that he made no notes when the defendant talked with him and that he took no written statement from the defendant at the police station. (R. Vol. 2, p. 530). He further admitted that the defendant Pruett was nervous and that no other witness heard the statement allegedly given by the defendant to Deputy Roach although there was plenty of police officers in the vicinity who could have been called in. He further admitted that at all times, the defendant consistently denied that he killed the deceased girl. (R. Vol. 2, p. 532).

Regarding this constitutional question it becomes very important as to what Roach said to the defendant Pruett at the commencement of Roach's and Pruett's conversation at the City Hall immediately following his arrest. Roach's statements in this regard were as follows:

> "I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he would tell me about it." (R. Vol. 2, p. 445).

This testimony of Roach's was uncorroborated. The defendant's testimony regarding the conversation at the police station with Roach was as follows:

"Q. I want you to tell this jury and this Court as nearly as you can remember what was said in that locker room by you and by Mr. Roach?

"A. Well, I got in there and he says, 'Now, Bob, we know you was the last one seen with this girl. We know that you were going in the direction of where we found her. We know that she would let you make advances above her waist but not below her waist and we would like to know what happened. We know that you did this. We know how you did it and why you did it. And I don't know if you know the punishment for first degree murder; but it is punishable by death in the electric chair.' And he also said at that time that there was lesser punishments that went along with this such as second and manslaughter and if I would tell him what had happened that night he would see if he couldn't get the charge broken down to a lesser degree. He said also that he didn't think that I meant to kill this girl, but that I did and that I should come clean and be honest with him and tell him about it." (R. Vol. 2, pp. 840-841).

The defendant's testimony went on further to the effect that Roach was trying to get him confused, was twisting his story around although he tried to tell Roach that the girl jumped out of his car on Lake Avenue and he also stated that he did not kill the girl.

The stories of these two witnesses are, of course, not reconcilable but there are some similarities. The defendant stated that Roach explained to him the different degrees of homicide and said he would help him if he made a statement. Roach stated in his testimony that he was helping him by taking a statement from him and while he denied that he told the defendant he would use his influence to knock down the degree of homicide, he did admit that he discussed the different degrees of homicide with the defendant. We feel that the question would arise in the mind of any reasonable person as to why in the world Roach would be discussing the different degrees of homicide with the defendant if he did not at the same time hold out to him hope of reducing a charge which might be brought against the defendant downward from first degree murder.

At no place in the Record was the defendant ever told that he had the right to remain silent and that anything he might say could be used against him. This rendered any alleged statement inadmissible. See Alexander v. Green, 2 Ohio State (2d) 231 (1965). The Alexander case was decided after the instant case was tried, and the Court held that before a voluntary statement of a defendant may be used in evidence, he must first be advised that anything he might say may be used against him.

We submit that any statement elicited from the defendant in the police station by Roach was illegally obtained and constituted a violation of the defendant's constitutional rights. Although the alleged statement made by the defendant was not a confession, it was an admission against interest. A leading case on this is Mallory v. U. S., 354 U. S. 449.

In the Mallory case the defendant was a 19 year old lad of limited intelligence who was arrested by the police on suspicion of rape. Even though the police had ample evidence from other sources than the defendant for regarding him as a chief suspect, they first questioned him for approximately one-half hour then asked him to submit to a lie detector test and to another test after four more hours of detention. He was not told of his right to counsel or to preliminary examination before a magistrate, nor was he warned that he might keep silent and that any statement made by him might be used against him. The defendant in the Mallory case was convicted and the death penalty imposed. The Circuit Court affirmed the conviction and the United States Supreme Court reversed it by a unanimous

decision. Justice Frankfurter's opinion was as follows:

> "The arrested person may be 'booked' by the police. But he is not to be taken in to police headquarters to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

With reference to the constitutional guarantee of the right to remain silent when a general inquiry has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, and the police have not effectively warned the suspect of his absolute constitutional right to remain silent, in violation of the 14th Amendment to the Federal Constitution, no statement elicited by the police during the interrogation may be used against him at a criminal trial, in accordance with the decision of Escobedo v. Illinois, 32 Ohio Opinions (2d) 31, 378 U. S. 478 (1964). In this case the Court said:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright . . . , and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

THIRD REASON

The Sixth Amendment to the U. S. Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

In determining and defining the word "impartiality" the following language is used in Dennis v. U. S., (195) 70 S. Ct. 518, 339 U. S. 162:

> "'Impartiality' is not a technical conception but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula."

In the instant case we feel that it was clearly shown that the juror Gillespie was guilty of the grossest kind of misconduct when he stated unequivically on his examination as a prospective juror that he had not formed or expressed

an opinion regarding this case. (R. Vol. 2, p. 13). He made the statement again, (R. Vol. 2, p. 14), stating that he could be a fair and impartial juror and that he would be one hundred percent neutral if permitted to sit. Again he testified to the same effect on examination by the Prosecutor. (R. Vol. 2, pp. 20-21). On examination by defense counsel he was asked:

> "Do you have an opinion now as to his guilt or innocence?"

and his answer was:

> "No sir, I do not." (R. Vol. 2, p. 24).

He was further asked by defense counsel:

"Q. But you are sure that there were no accounts that you read or anything that you heard anybody else say that would cause you to form an opinion as to the merits of this case?

"A. No sir."

Later in Mr. Gillespie's testimony (R. Vol. 2, p. 27) he was examined by the Court as to the condition of his wife who he had previously testified was ill and might of necessity have to be taken to the hospital at any time. The Court asked him:

"Q. Let's get at it this way then. How do you feel about it? Do you feel that you could serve in the light of this circumstance or that you could not? We will go from there.

"A. I feel as though I could. If either law enforcement agency or someone would be notified in case of emergency and the boy couldn't be located, that she would be rushed to the hospital because when she gets these attacks she can't breathe. The bronchial tubes close and as long as someone could get her there, I feel I could serve." (R. Vol. 2, pp. 33-34).

The above question and answer is set forth here to show the extreme anxiety on the part of Mr. Gillespie to serve as a juror which ties in with the statements the defense proved that he made before being sworn as a juror showing his prejudice.

The affidavit and testimony of Gene R. Osborne who was a panel member but who was not finally selected to sit as a juror, was to the effect that the juror Gillespie prior to being called for voir dire examination stated on several occasions within Mr. Osborne's hearing, that in his opinion Robert LeRoy Pruett was guilty of the crime for which he was charged and at a later time shortly before Gillespie was called into the jury box, he expressed his opinion very clearly that he thought Pruett was guilty and that he was anxious to serve on the jury because he wanted to see him found guilty. Mr. Osborne not only gave

his affidavit which was admitted in evidence but he testified to substantially the same things that were covered in his affidavit. (R. Vol. 2, Supp. pp. 2-28). In his testimony he stated that he heard Gillespie state his opinion several times prior to being sworn as a juror, and he testified that Gillespie said he thought the defendant was guilty and there were other people around in the vicinity, although he could not tell exactly who they were but he believed prospective jurors Shannon and Ball were there. His testimony is replete both with statements on direct and cross-examination that he heard Gillespie say he thought the defendant was guilty and although the Prosecutor on cross-examination tried to shake him in this regard, he insisted throughout his cross-examination that he had heard these statements.

Another prospective juror who was not finally selected to sit but who was on the panel was William Shannon, who was called by the State on the hearing of the motion for a new trial. He stated on cross-examination (R. Vol. 2, Supp. p. 62), that he heard Gillespie state before he was finally chosen as a juror that he would like to sit on the jury, which simply adds to the misconduct of the juror who has formed an opinion, has expressed it and then makes the statement he wants to sit on the jury. How could any Court say that such a man could be fair and impartial?

The Court in his opinion overruling the motion for a new trial would not admit the affidavit of the juror Vivian Hall, this affidavit being to the effect that the jurors freely discussed the evidence in the case after they had been sworn as jurors and during the progress of the trial.

The affidavit of Mrs. Hall is replete with derogatory statements made by various members of the jury regarding the defendant and in particular statements made by the juror James Gillespie, who said at one time that he thought the defendant was guilty and as the case progressed, he said at various times in substance "my mind hasn't changed". Mrs. Hall's affidavit stated that on one occasion in response to what Mr. Gillespie had said, Mrs. Hall said in substance, "What do you mean, your mind hasn't been changed?" Mr. Gillespie said in substance, "Can't you see the man is guilty?". It must be borne in mind that all of the matters contained in Mrs. Hall's affidavit took place prior to the final submission of the case to the jury, some of the occurrences transpiring outside the jury room.

The matters contained in the affidavit and testimony of Gene R. Osborne were not instances occurring after Gillespie had been sworn as a juror, but rather all of these matters occurred prior to his final selection as a juror. Following the statements mentioned above, he took the jury box and on his voir dire swore that he had no opinions and could be a fair and impartial juror. Can it be said, in view of this clearly proven misconduct on the part of Gillespie that the defendant had a fair and impartial trial by a fair and impartial jury? We emphatically say that it cannot.

In the case of Carr v. State, 22 Ohio Appellate 78, the Court said:

> ""Juror who, on his voir dire in bribery prosecution, falsely stated that he had not formed or expressed an opinion as to accused's guilt, held not qualified as juror, and conviction must be reversed."

There are other Ohio citations too numerous to set forth in this Petition.

The trial Court held in overruling the motion for a new trial that the affidavit of Vivian Hall was inadmissible because evidence aliunde had not been offered. It is submitted that the testimony of the prospective juror, Gene R. Osborne, who was never sworn as a juror, was sufficient evidence aliunde to have permitted Mrs. Hall's affidavit to have been admitted in evidence and to have been considered by the Court. The evidence of Gene R. Osborne both by affidavit and by way of his testimony was evidence as to matters occurring before the jury was finally sworn and had to do with misconduct, particularly of Mr. Gillespie, and we submit this evidence was sufficient to have afforded the trial Court the right to consider Vivian Hall's affidavit, and it also being in our opinion amply sufficient forthis Court to assume jurisdiction.

FOURTH REASON

It is contended that the Court erred in permitting the indictment in this case to be amended. (R. Vol. 2, pp. 589, 590, 591).

The indictment as returned by the Grand Jury reads as follows:

"State of Ohio, Ashtabula County, SS. In the Court of Common Pleas Ashtabula County, Ohio, of the Term of September in the Year of Our Lord 1964, recalled, the jurors of the Grand Jury of the State of Ohio within and for the body of the County of Ashtabula, impaneled, sworn and charged to inquire of crimes and offenses committed within the said County of Ashtabula in the name and by authority of the

the State of Ohio upon their oaths do find and present that one Robert LeRoy Pruett, late of said County, on or about the 15th day of September, in the year of Our Lord 1964, with force and arms in said County of Ashtabula and State of Ohio, did unlawfully, purposely and while in the perpetration of a rape kill Susan Osborne; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Ohio." The amendment to the indictment permitted by the Court consisted of the insertion of the following words, "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape."

The indictment in this case was brought under Ohio Revised Code 2901.01 a portion of which Statute reads as follows:

> "No person shall purposely, either of deliberate or premeditated malice, or by means of poison, or in perpetration or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

Ohio Revised Code 2941.30 provides for the amending of an indictment and reads in part as follows:

> "The Court may at any time before, during, or after a trial amend the indictment, information, or Bill of Particulars, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime."

The reading of Ohio Revised Code 2941.30 clearly indicates that no change in the name or identity of the crime charged may be permitted by amendment and this Section does permit amendment "in respect to a defect, imperfection or omission in form or substance, or any variance with the evidence, . . ." The Record does not disclose that the Prosecutor advanced any reasons why he decided to amend the indictment, the arguments of counsel on both sides not appearing in the Record. However, defense counsel strongly argued against the amending of the indictment for the following reasons, to-wit:

(1) A new crime was added to the indictment, to-wit: "while attempting to commit rape."

(2) The amendment could not possibly have been made "in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence . . ."

In discussing our first ground of objection, the reading of the Statute under which the indictment was brought, to-wit: Ohio Revised Code 2901.01,

discloses that there is a crime of killing another in perpetrating rape and also a crime of killing another in attempting to perpetrate a rape. The indictment as originally returned by the Grand Jury properly charged the crime of murder in perpetrating a rape. There was no defect, imperfection or omission in form or substance in the original indictment. Therefore, it could not be amended with respect to these matters. If the Grand Jury failed to indict for murder while attempting to commit a rape, this could have been remedied by the recalling of the Grand Jury and the returning of another indictment. However, it is submitted that this new offense could not be added to the original indictment because this would be contrary to Ohio Revised Code 2941.30.

With reference to our second ground of objection to the amending of the indictment, a careful reading of the Record will clearly disclose that the indictment could not possibly be amended in respect to any variance with the evidence. It was not proven by the evidence in this case that a rape was committed and there was absolutely no evidence in the case that a rape was attempted. However, it may be stated at this point that the uncontradicted facts in this case contraindicate an attempt to rape and likewise, contraindicate the actual rape itself as alleged in the original indictment. See State v. Wozniak, 172 Ohio State 517, State v. Cimpritz, 158 Ohio State 490, State v. Presler, 112 Ohio Appellate 437. Also see Harris v. State, 125 Ohio State 257.

In the Harris case the Court said:

> "The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the Court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the Court to convict him on an indictment essentially different from that found by the grand jury."

The following language is found in the Wozniak case:

> "Any other holding in a case such as this would be inconsistent with the provisions of Section 10 of Article I of the Constitution of Ohio providing that 'no person shall be held to answer for' a crime such as this 'unless on presentment or indictment of a grand jury.' To require defendants to answer for the crime sought to be charged in count one of this indictment after amendment of the indictment by addition thereto of a missing charge of an essential element of that crime would be to require defendants to answer for a crime

other than on 'presentment or indictment of a grand jury'. In order to justify conviction of a defendant for such a crime, the grand jury and not the prosecutor, even with the approval of the Court, must charge the defendant with each essential element of that crime."

FIFTH REASON

After the defendant had rested his case the State in rebuttal offered further evidence by way of the testimony of Rosemary Karr. (commencing R. Vol. 2, p. 1181). Mrs. Karr testified in substance that she and her husband lived in a house which in general abuts the southeast corner of the residence property of Maxine Morgan, the defendant and his wife living at that time at the Morgan residence. Mrs. Karr testified in substance that during the early morning of September 15, 1964, she was asleep in one of their bedrooms which was on the north side of their home and which had windows facing in the direction of the Maxine Morgan residence. She testified that about 2:30 a,m. she awoke and as she was quite awake, she turned on her radio. This testimony was objected to by the defense as not being rebuttal evidence but the objection was overruled. She testified that she laid awake and then Maxine Morgan's light went on, which consisted of a floodlight located over her back door. She said that a few seconds later she heard a door slam and saw Marcia Pruett, defendant's wife, run across the driveway to the east and down the Morgan driveway to the north and then to the east towards town. Her testimony was that this occurred at about 3:10 a.m. She also testified that this was a very nice, clear night. At this point defense offered strenuous objection asking that the testimony be stricken as not rebuttal which was overruled by the Court. (R. Vol. 2, pp. 1187-1188).

On cross-examination Mrs. Karr testified that there was a high hedge between her residence and the Morgan residence. (R. Vol. 2, p. 1192). She also testified on re-cross-examination that she had not related these facts to the authorities until two nights before she was called to testify in rebuttal. (R. Vol. 2, p. 1196).

The State thereupon rested and the defense at this juncture asked the Court to re-open its case to put in further testimony or, in the event that was denied, for the right to offer surrebuttal evidence refuting in particular the testimony of the State's rebuttal witness, Rosemary Karr. (R. Vol. 2, pp. 1215-1221). The defense directed the Court's attention to Ohio Revised Code 2945.10,

which sets out the order of proceedings in a criminal case, and which provides in part:

> "(D) The State will then be confined to rebuttal evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.
>
> "(G) . . . The Court may deviate from the order of proceedings listed in this section."

After the defense brought to the Court's attention several authorities and discussed its position, the Court overruled defendant's motion and the defense proceeded by calling to the stand the witness Maxine Morgan. The Court permitted the witness to answer preliminary questions, however, the substance of her testimony was excluded and the defense placed the same in the Record by the method of asking a question, and when the same was objected to by the State and the objection sustained, proffering the answer.

In essence the proffered testimony of Maxine Morgan was to the effect that during the early morning of September 15, 1964, she was at her residence at 519 Liberty Street, Conneaut, Ohio, and was up and about until she retired at 2:30 a.m.; that during said period she heard no slamming of her back door; that her bedroom was on the first floor of the house and that her bed was within six (6) feet of the lower end of the stairway which leads to the second floor and fifteen (15) feet from the back door of her residence; that at about the hour of 3:10 a.m., of the morning of September 15, 1964, she was awake and that no person left her house; that when the floodlight on her back door is illuminated, it shines into her bedroom, but that on the morning of September 15, 1964, at about 3:10 a.m. the floodlight did not shine into her bedroom; that the stairs leading to the second floor of her house are creaky; and that at the back of her property along the southerly line of the same and in front of the Karr residence on September 15, 1964, there existed a high hedge approximately twenty (20) feet in height which during the month of September was very luxuriant. (R. Vol. 2, pp. 1222-1235).

At this point the defense had its Exhibits G, H, I, and J marked for identification one of which was a photograph taken in Miss Morgan's back yard on September 7, 1964, exactly one week prior to September 14, 1964, with the camera pointing in a southeast direction showing the foliage which existed at that

time on that portion of the hedge at the back of her property with the Karr house in the background, the remaining photographs being taken at a later time during the winter months when there was no foliage on the hedge but showing general views of the hedge with reference to the Karr residence and general views of the Karr residence, the Adamack residence, the Morgan residence, the back yard of the Morgan residence and the high hedge, all with reference to each other.

The defense then called Marjorie Clowes to testify for the same reason as the preceding witness. With the exception of several preliminary questions, the testimony of this witness was also excluded, and the Record was made up in the same fashion as with the witness Maxine Morgan. The proffered testimony in essence was as follows, to-wit: that Mrs. Clowes was the mother of Marcia Pruett; that her bedroom in the Morgan house was on the second floor a short distance from the top of the stairway and almost directly over the back door; that the stairs on the morning of September 15, 1964, were creaky and that on said morning at or about 3:10 a.m. no one left the Morgan house or slammed the back door and that she was awake during the entire evening and during the early morning until approximately 3:30 a. m. (R. Vol. 2, pp. 1231-1243).

The defense then offered three witnesses: Wilber P. Dyer, John Tyler, and David Weir, on the same basis as the preceding witnesses, namely, to rebut the testimony of the State's witness, Rosemary Karr and the Court excluded the testimony of these three witnesses and the testimony was proferred by the defense in the same fashion as was done with the witnesses, Morgan and Clowes. (R. Vol. 2, pp. 1242-1264.)

It is the contention of the defense and was strongly urged during the trial that the evidence of the witness Rosemary Karr was not rebuttal evidence and should not have been permitted after the defense rested. If it had any value at all to the State, its value would have been as direct evidence because apparently what the State was trying to imply by this evidence was that the defendant was not home at 3:00 a.m. on the morning of September 15, 1964, and that his wife left the house in an effort to find him. Had this been presented in chief, which would have been the proper time, there would have been no question about the right of defense to present its evidence in opposition in the defense in chief.

Be that as it may, the Court did permit this evidence to be introduced as rebuttal evidence which we submit was highly improper, the jury having heard this evidence. However, in furtherance of justice and by virtue of Ohio Revised Code 2945.10, we feel that it was the duty of the Court to exercise its discretion liberally towards the defendant and not take the narrow view which was taken by the Court. The Court went so far as to permit the defendant and his wife to testify in what may be called surrebuttal but then cut the evidence off and did not permit the disinterested witnesses offered by the defense to testify. This we submit as one of the grossest errors against this defendant and was certainly a flagrant abuse of the Court's discretion. In support of our contention, we would like to refer to several Ohio authorities.

In the case of Itskin v. State, 51 Ohio Appellate 211 (1953), the Court said:

> "The other error complained of in the Itskin case relates to certain rebuttal, which the defense contends was not proper rebuttal, and should have been offered in chief."

The record in the Itskin case discloses no objection to the witness being called for rebuttal, and the Court then permitted Itskin to call a witness for surrebutal. There was no prejudicial error in what was done.

The Itskin case clearly holds that there exists in Ohio the right for the defense to submit surrebuttal in answer to rebuttal by the State in criminal cases. Further it would appear that the defendant went one step further in the instant case in improving his position over the Itskin case in that the defense objected to the State's so-called rebuttal evidence (Rosemary Karr) whereas in the Itskin case, the defense was permitted surrebuttal even though he did not choose to object to the State's rebuttal evidence.

Further in the Itskin case, it would appear that the rebuttal evidence offered actually was evidence that should have been offered in chief. The Court let the evidence in, however, in rebuttal, which is all the more reason why the defendant should have had the right to surrebuttal.

Another very important case in Ohio is the case of Donald v. State, 11 Ohio Circuit Decisions 483 (1900). In this case the Court said:

> "By the law of evidence testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretional authority of a trial court to re-open a case in chief at any time before it is finally closed and let such evidence in. But this should not be done when without fault on his part, the

reason of the discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony, which he might have made if it had been regularly given.

". . . I presume all trial courts have re-opened cases for the purpose of letting in, during the reply, new evidence that properly and strictly would be in chief. But in connection with that, the rule always has been, as we have understood and seen it applied that if the plaintiff re-opens, the defendant has a right to rejoin. (Underscoring supplied.)

In State v. Lett, 106 Ohio Appellate 285, (1958), the State put evidence on in rebuttal and the Court held:

"Inasmuch as the defendant first raised the issue and produced his evidence in support thereof, the State was entitled to an opportunity to rebut it. In doing so, the State introduced no new matter, so that there was no occasion for surrebuttal by defendant." (Underscoring supplied.)

This case again recognizes the right of the defendant to present surrebuttal if the State has introduced new matter in its rebuttal testimony. A reading of the Record in the instant case clearly demonstrates that the testimony of Rosemary Karr was new matter.

With reference to the construction of Ohio Revised Code 2945.10, the Court's attention is directed to the case of State v. Miles, 41 Ohio Law Abstract 1 (1943). In this case the Court permitted the State while in the midst of examining a rebuttal witness, to stop, re-open the defense's case in chief for further cross-examination of a defense witness and then go back to further examination of its own rebuttal witness. The Court in permitting this went back to the Statute which preceded Ohio Revised Code 2945.10 and which was in effect in 1929 and provided:

"The State will then be confined to rebuttal evidence unless the Court for good reason in furtherance of justice shall permit it to offer evidence in chief."

The old Statute was much more liberal and it would not be difficult to see how the Court in the Miles case would reach the decision it did if it were operating under the Statute. However, the liberal form of this Statute was changed in 1929 and the Court in the Miles case (1943) still adhered to the liberal construction by allowing this evidence in chief. This case, therefore, stands for the proposition here that the Court, in addition to having the power to permit the defense to offer surrebuttal, could have also attacked the problem not through the doctrine of surrebuttal, but by virtue of the Miles case, could have permitted the defen-

dant to re-open his case in chief, and then offer his evidence in refuting the testimony of Rosemary Karr. In passing let it be said that all of these cases show a very broad power in the Court to permit justice to be done. It must be borne in mind that this was a first degree murder case wherein the defendant's life was at stake which is all the more reason for the Court exercising a wide discretion in furtherance of justice.

Another case decided since the present Statute has been in effect, which shows how far the Courts have gone in applying the wide discretion of the trial judge in furtherance of justice, is the case of Vecchio v. State, 8 Ohio Law Abstract 335 (1930), where the Court permitted the State to re-open the case and put in testimony as to the age of the defendant after the case had been submitted to the jury saying that, "We think it would have been great error on the part of the Court under such a situation to refuse the application of the State even at that point in the trial, to offer evidence concerning the defendant's age."

SIXTH REASON

The defendant stands convicted of murder in the first degree as that offense is defined in Ohio Revised Code, Section 2901.01. The penalty clause of this section of the Ohio Revised Code provides that "unless the jury trying the accused recommends mercy", the violator "shall be punished by death". Unless this Court entertains favorable disposition of this application, the defendant will die at the hands of the State of Ohio.

While it is recognized that there is prior authority to the contrary so far as capital punishment is concerned, we respectfully urge that this Court again consider the question as to whether or not the putting of an individual to death by the State in a deliberate and premeditated fashion violates the Eighth Amendment to the United States Constitution which prohibits the infliction of cruel and unusual punishment. It is contended that under our present day moral principles, the putting to death of an individual even by a State is "cruel and unusual" and, of course, the Eighth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment.

Present civilized standards would seem to indicate that the death penalty while approved over the years by State and Federal Courts alike, should now be done away with in view of our changing times and the view which is taken by all moral people on the sanctity of human life. As a matter of morals the State of Ohio, or any other state for that matter, is no more justified in taking the life of a human being than is an individual. Many states have abolished capital punishment within their limits and the time has come when this penalty should be abolished in every state by a holding of this Court.

SEVENTH REASON

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

It is submitted that the exclusion of prospective jurors on the sole ground that they are opposed to capital punishment prevents the defendant from having a fair and impartial trial by a fair and impartial jury. The net result of applying the rule of excluding all persons who are opposed to capital punishment from sitting on a jury is to inevitably get a jury of twelve people, all of whom favor capital punishment. While we know of no authority sustaining our position in this regard, it is strongly urged that this Court should scrutinize this issue very carefully to the end that the determination be made as to whether or not a jury composed of individuals favoring capital punishment is in fact a fair and impartial jury in the trial of a first degree murder case as contemplated by the Sixth Amendment.

CONCLUSION

It is felt that the result reached in this case by the jury, to-wit: conviction of murder in the first degree without a recommendation of mercy, was caused not so much by any evidence produced by the State, as it was by the brutal and tragic death of the deceased and the horrible and repugnant conditions surrounding the finding of the body. This may be understandable when one considers that jurors are persons devoid of legal experience and are controlled to a large extent by emotions rather than reason. This undoubtedly contributed to the

extreme verdict returned by the jury in this case.

It is indeed fortunate that in our country even though a crime is revolting to our moral senses, the elements of the trial may be considered by the highest court in our land. We respectfully submit that a careful consideration of the claimed violations of well recognized constitutional safeguards in this case warrants the granting of this Petition for a Writ of Certiorari by this Court.

Respectfully submitted,

NAZOR AND NAZOR

BY Howard M. Nazor

BY Gordon L. Nazor

ATTORNEYS FOR PETITIONER
Gillmore Building
Ashtabula, Ohio 44004
216-993-2121

A copy of the within Petition for Writ of Certiorari to the Supreme Court of the State of Ohio and Appendix of the petitioner, Robert LeRoy Pruett, was served upon Joseph E. Mahoney, Prosecuting Attorney of Ashtabula County, Ohio, by handing same to him personally on the 11th day of April, 1968.

NAZOR AND NAZOR

BY Gordon L. Nazor

ATTORNEYS FOR PETITIONER

CONSTITUTION OF THE UNITED STATES:

AMENDMENT IV - SEARCHES AND SEIZURES. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VI - RIGHTS OF ACCUSED. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT VII - EXCESSIVE BAIL, FINES, PUNISHMENTS. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV - RIGHTS OF CITIZENS. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES.

OHIO REVISED CODE, Section 2901.01. Murder in the first degree. (GC Sections 12400, 12399).

"No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution."

OHIO REVISED CODE, Section 2933.23. Affidavit for search warrant. (GC Section 13430-3).

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant."

OHIO REVISED CODE, Section 2941.30. Amending an indictment. (GC Section 13437-29).

"The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if

a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted."

OHIO REVISED CODE, Section 2945.10. Order of proceedings of trial. (GC Section 13442-8).

"The trial of an issue upon an indictment or information shall proceed before the trial court of jury as follows:

(A) Counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which he expects to sustain it.

(B) The defendant or his counsel must then state his defense, and may briefly state the evidence which he expects to offer in support of it.

(C) The state must first produce its evidence and the defendant shall then produce his evidence.

(D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.

(E) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it.

(F) When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or

other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section."

28 U.S.C.A. 1257 (3). STATE COURTS; APPEAL; CERTIORARI

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 67 TERM

To wit: December 20, 1967

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

APPEAL FROM THE COURT OF APPEALS

for ASHTABULA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.* and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 9th day of February, 1968, as the date for carrying said sentence into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* ASHTABULA *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this day of 19

Clerk

Deputy

5

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 67 TERM
To wit: December 20, 1967

The State of Ohio,
Plaintiff-Appellee,
vs.
Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

MANDATE

To the Honorable COMMON PLEAS COURT
Within and for the County of ASHTABULA, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

It is also ordered that the execution date be set for Friday February 9, 1968.

THOMAS L. STARTZMAN,
Clerk

..... *19*.....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee . . . . . $ 20.00 *Paid by* Nazor & Nazor
Docket Fee . . . . . $ *Paid by*
Docket Fee . . . . . $ *Paid by*
Printing Record . . . . . $ *Paid by*
Supplemental Record . . . $ *Paid by*
Sheriff's Costs . . . . . $ *Paid by*
Sheriff's Costs . . . . . $ *Paid by*

908 (BLANK-ENTRY) Baker's Reference, Pittsburgh, Pennsylvania, U.S.A.

THE STATE OF OHIO,
City of Columbus.

19 68 TERM

To wit: Thursday, January 4, 1968

The State of Ohio,
Plaintiff-Appellee,

vs.

Robert LeRoy Pruett,
Defendant-Appellant.

No. 41163

ENTRY

Upon consideration of the motion, filed by counsel for Appellant, to stay the execution of sentence pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that the execution of sentence be, and hereby is, stayed pending the timely filing of an appeal to The Supreme Court of the United States, and it is further ordered that if such appeal is timely filed, this stay will continue for an indefinite period pending final determination by The Supreme Court of the United States.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this entry staying execution to the Warden of the Ohio Penitentiary, who shall acknowledge receipt thereof.

Kingsley Taft.
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 4th *day of* January, *19* 68

THOMAS L. STARTZMAN *Clerk.*

By Jane L. Jennings *Deputy.*